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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6327 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No.

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

UDEYSINH PATHABHAI CHAUHAN

Versus

BHAVNAGAR MAHA NAGAR PALIKA

Appearance:

MR MAYUR S BAROT for Petitioners

MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 15/06/98

ORAL JUDGEMENT

Rule. Mr. J.R.Nanavati for the respondent waives service of Notice of Rule.

The petitioners who are the original applicants in Ref.(LCB) No. 833 of 1987 on the file of the Presiding Officer, Labour Court, Bhavnagar have preferred the present petition against the order passed by the Labour Court, Bhavnagar on 2.7.1996. They have come with a case that they were working on permanent posts on the establishment of the respondent Bhavnagar Mahanagar Palika and that all of a sudden, their services were terminated orally without following the due procedure. Though they had made repeated requests for their reinstatement, they were not reinstated in service. Therefore, they approached the concerned authorities and on account of their application, a Reference was made by the authorities to the Labour Court in view of the stand taken by the respondent that there were no relations of employee and employer between the respondent and the petitioners and as there was no possibility of any conciliation between the parties.

2. In the said Reference, the respondent had taken the same stand by contending that present petitioners were not in the employment of the respondent and no relationship of employer-employee existed between the respondent and the petitioners. The petitioners as well as the respondent had led evidence in support of the rival claims and on considering the materials before the Labour Court, the Labour Court had found that present petitioners were in the employment of the respondent-Bhavnagar Maha Nagar Palika and that they were wrongly retrenched/removed. The Presiding Officer, Labour Court therefore, allowed the claim of the petitioners for reinstatement in service. However, the Labour Court came to the conclusion that present petitioners were not entitled to get any back wages. The Labour Court therefore, rejected the claim for back wages on two grounds viz. (1) no work no pay and (2) that the claim of the petitioners that they were not in employment after their retrenchment could not be believed and accepted.

3. Present writ petition is filed only to challenge the rejection of the claim of the petitioners for back wages. It is contended on behalf of the petitioners that the approach of the Labour Court is not proper and correct and the reasons given by the Labour Court in rejecting the back wages to them are not proper and in the circumstances of the case, they should be awarded back wages from the beginning.

4. Learned advocate for the respondent Mr. J.R.Nanavati urged before me that the Labour Court has appreciated the evidence on record and this court should not interfere with the appreciation of evidence made by the Labour Court by exercising powers under Article 227 of the Constitution of India. It is submitted that in a proceedings under Article 227 this court cannot have re-appreciation of the evidence and this court cannot record a finding on reappreciation of evidence.

5. It is true that I am considering the present proceedings under Article 227 of the Constitution of India. I am also aware of the legal position that while exercising the powers under Article 227 of the Constitution, I have no power for reappreciation of the evidence on record and I cannot record a finding contrary to the finding recorded by the court below. But it is also the settled law that if the finding of fact recorded by the court below is a perverse or grossly erroneous one and if such a finding is arrived by the labour court on account of improper approach of the Labour Court, then this court has got power to interfere with the said finding.

6. At the outset it must be stated that the respondent has not challenged the finding recorded by the Labour Court viz. that there is wrongful retrenchment of the present petitioners. Therefore, that finding recorded by the Labour Court has become final and therefore the only question to be considered is as to whether the Labour Court was justified in refusing to grant the back wages to the petitioners. When it is found that there is wrongful dismissal or retrenchment of an employee by the employer and the court finds that he is to be reinstated, then the normal rule is that, he is to be reinstated with full back wages. The Labour Court also seems to be aware of this legal position. Therefore, the Labour Court has proceeded to consider the material on record in considering the question as to whether the petitioners are to be paid back wages or not. But if the reasoning given by the Labour Court in rejecting the claim for back wages are considered, then it would be quite clear that the approach of the Labour in the matter is totally perverse. The Labour Court has observed that present petitioners have not stated in their original application as well as on oath as to what was the pay they were drawing on the date on which they were retrenched. This failure on their part seems to have swayed away the Labour Court in considering the

evidence on record. In my view, the petitioners need not have specifically stated as to what was their salary or wages on the date of their dismissal/retrenchment. Had they stated that fact, it would have of much use to know exactly what was the salary on the date of their retrenchment/dismissal. But in the present proceedings, it is not the question as to what was the salary of the petitioners but in the present proceedings the question is as to whether their services were properly terminated or not. The Labour Court has also not mentioned in its reasoning that present petitioners had stated in their original application on oath that they were not in employment after their dismissal/retrenchment. There is no dispute of the fact that present respondent had not raised a contention in the reply filed to the original Reference that any of the present petitioners was in employment and/or was earning a particular amount by way of wages or salary. It is settled law that in cases of wrongful retrenchment, if the retrenched employee seeks reinstatement with backwages stating he was not gainfully employed anywhere, then the burden lies on the employer to prove that the employee was in gainful employment and he was earning a particular amount. It seems that the Labour Court has not taken into consideration this settled legal position. The Labour Court has proceeded on the basis that it was for the petitioners to prove as to what was their actual earning and what they were earning after retrenchment/removal. The Labour Court also went on to state that their iclaim, though they were not earning could not be believed and accepted. But when the employer himself is not disputing the claim of the petitioners that they were not employed anywhere, then the Labour Court was not at all justified in holding that the claim of the petitioners that they were not employed could be believed. Therefore, in view of wrong approach of the Labour Court, the Labour Court has recorded a finding that that the claim of the petitioners that they were not earning could not be believed and accepted. Consequently said finding is obviously a perverse and erroneous finding and the same dserves to be interfered with by exercising powers under Article 227 of the Constitution of India.

7. At the cost of repetition it must be stated that generally when the court finds that retrenchment of an employee illegal and improper, the court directs reinstatement of the employee with full back wages. But it is neither a common law nor any specific provision of statutory law that the reinstated employee is as of right entitled to back wages. Granting reinstatement either with full backwages or proportionate wages is as per the

material placed before the court. In the instant case, the respondent is a municipality and as observed by the Labour Court, the respondent is not a profit making Institution. The respondent is a local self Government fulfilling the needes of the citizens of a city. Therefore, this aspect of the respondent will have to be borne in mind. Similarly it must be also taken into consideration that the reference in question was made in the year 1987 and said reference has been decided on 2.7.96. Thus it is after more than 9 years. Therefore, taking into consideration these two aspects and other relevant circumstances to ask the respondent Municipality to pay wages to all the three petitioners for more than 9 years would be putting the said municipality into financial difficulties. Therefore, in the over all view of the matter I hold that the present petitioners should be allowed only 50 percent backwages from the date of retrenchment/removal from service till the date of reinstatement. No doubt learned advocate for the petitioner has cited before me the judgment of this Court in SCA No.13309 of 1994 in the case of Bhavnagar Municipal Corporation vs. Hanubhai B.Rathod decided on 7.9.95. In that case the Bhavnagar Municipal Corporation which is respondent before me in this matter had challenged the order passed by the Labour Court, Bhavnagar on 19.7.94 by which the respondent in that case was reinstated with full backwages. That writ petition filed by the respondent before this court has been rejected but there is no consideration of any principle as to in what circumstances the employee should be granted full back wages. Therefore, that case has no bearing on the facts of the present case. In the circumstances of the case I hold that present petition will have to be allowed partly. I accordingly allow this writing petition by ordering modification of the award passed by the Labour Court,Bhavnagar inserting the following words in the said award.

"The petitioners are entitled to reinstatement with 50 percent backwages from the date of retrenchcment/dismissal till the date of reinstatement"

The respondent is directed to comply with the award as modified above within 8 weeks from the date of receipt of the writ of this court.

No order as to costs. Rule made absolute to the aforesaid extent only.

(S.D.Pandit.J)